

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO. 272 OF 1994

For Approval and Signature:

Hon'ble MR. JUSTICE S.D. DAVE.

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1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

1 to 5 : No

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NAROTTAM B. SHAH

Versus

C.R.SHAH SUPDT. OF CENT. EXCI.

Appearance:

MR AR GANGULEE for MR SB VAKIL for the petitioners

MR GEHANI for respondent no.1

MR PM DAVE for respondent no.2

MR TUSHAR MEHTA for respondent no.3

MR JIVANLAL G. SHAH for respondent no.4

MR HARSHAD J. SHAH for respondent no.5

MR RS SANJANWALA for respondent no.6

MR AS VAKIL for respondent no.9

PUBLIC PROSECUTOR for respondent no.10.

CORAM : HON'BLE MR.JUSTICE S.D.DAVE

Date of Decision: 7/04/1998

CAV JUDGMENT

Present proceedings are under Article 227 of the Constitution and under Section 482 of the Code of Criminal Procedure, 1973. The question relates to certain aspects of the Central Excise & Salt Act, 1944, and the Rules framed thereunder. The prayer is for the quashing of the proceedings, namely, Criminal Case No.441 of 1987 filed by the respondent no.1 herein, the Superintendent of Central Excise, Group-II (Preventive Wing), Central Excise Collectorate, Ahmedabad qua the petitioner. The said complaint is for the alleged commission of the offences punishable under Section 9 of the Central Excise & Salt Act, 1944, read with Rule 173(Q) of Central Excise Rules, 1944, for the alleged violation of Rules 52-A, 56-A, 173-G & 9(2) read with Section 11-A of the Central Excise & Salt Act, 1944, read with Section 120-B of the Indian Penal Code. The said complaint came to be filed on August 4, 1987, and the process has been issued against the accused, including the petitioner Shri Narottam B. Shah, who happens to be the Senior Assistant of M/s.Rajendra & Co., Chartered Accountants, having their office at Maker Chambers-IV, 222, Nariman Point, Bombay - 21.

The prayer of the petitioner proceeds on the say that, there is absolutely no substance whatsoever in the said complaint so far as it pertains to the petitioner and that, "if the complaint is taken as a whole as it is and read without adding or subtracting therefrom anything, it does not disclose the element of the commission of any offence so far as the petitioner is concerned."

The petitioner says in the petition that, he was a Senior Assistant in the firm of M/s.Rajendra & Co., Chartered Accountants, Bombay, at all the relevant times, and that the said firm has been carrying on, the audit of the respondent no.2 Company, i.e. Reliance Industries Ltd. (now hereinafter referred to as 'the Company'). The respondent no.1 happens to be the Superintendent of Central Excise, and has filed the above said complaint before the Court of the learned Metropolitan Magistrate. The divisions of the said Company which were and have been audited by the petitioner have been located at Bombay, Ahmedabad, Sidhpur, Pataldanga etc. and that, the complaint before the Magistrate, which came to be filed by the respondent no.1 some time in 1987 alleges that, between July 10 and 12, 1983, the unit of the said Company at Ahmedabad had made a wrong credit entry in the

Excise records, that is RG-23 Part II, Register for the purposes of clearing certain goods and that, at the time of clearing the said goods, had made certain debit entries for the payment of excise against the said credit entry. The say of the petitioner is that, the above said credit entry is alleged to have been made by one Dilip Patel at the instance of his superior Mr. Suman Patel and that the petitioner has been impleaded in the said complaint because the petitioner was one of the auditors of the Company. According to the petitioner, as per the complaint, the above said incorrect credit entry was discovered by the Excise authorities in May 1987, but the said entry has since then been reversed some time in June 1987. According to the petitioner, on the complaint being filed by the respondent no.1, process was ordered to be issued by the learned Magistrate under his orders dated August 4, 1987. But after the filing of the above said complaint, the complainant had presented the application on 19th September 1987 for the amendment of the complaint by inserting in the cause title and the body, Section 9-AA of the Central Excise & Salt Act, 1944. Learned Magistrate had passed necessary orders on 3rd January 1988 allowing the application for amendment, so that the addition of Section 9-AA of the Central Excise & Salt Act, 1944 would be not only both in the cause title and the body of the complaint but also in the prayer clause. According to the petitioner, the original accused no.5-Shri Dilip Patel had filed Misc. Criminal Application No.141 of 1989 before this Court, challenging the validity, legality and propriety of the orders dated 3rd January 1989, pronounced by the learned Magistrate on the ground that, Section 9-AA of the Act which was introduced by the Parliament in the Central Excise & Salt Act, 1944, with effect from 25th December 1985 was a penal section, and it should and could not have the retrospective effect and therefore, the same could not be pressed in service in the complaint filed by the respondent no.1. According to the petitioner, the said Misc. Criminal Application came to be allowed by this Court vide the orders dated July 23, 1993. The petitioner had also filed a Criminal Writ Petition before this Court challenging the very same orders, being Criminal Writ Petition No.422 of 1993. The said writ petition has been disposed of in view of the orders dated 23rd July 1993, under which the orders passed by the learned Magistrate dated 3rd January 1989 have been set aside, qua the petitioner also.

The say of the petitioner further is that, regard being had to Section 9 and Section 9-AA of the Central Excise & Salt Act, 1944, no offence appears to have been

made out against him. It is also further the say of the petitioner that, in the facts and circumstances of the case, he being an Assistant in the firm of a Chartered Accountant who had audited the accounts of the Company, cannot be made liable for any of the charges levelled against him. According to the petitioner, in his statement which came to be recorded by the respondent no.1, he has made it abundantly clear that the auditors do not check each and every entry of RG-23 Part II Register and that the mistake of the Company was not detected and that the Company had not informed the Auditors about any such mistake. According to the petitioner, the only result of such entry in the accounts of the Company would be of showing additional profit in the Profit & Loss Accounts of the Company which is a normal thing and "nothing suspicious gives rise to as a result thereof."

According to the petitioner, the orders passed by the Collector of Central Excise & Customs clearly say, so far as the motive or intention part is concerned that, the said authority had found that at no stage the relevant Register was held back from the Departmental Officers. It was also held that the factory was being regularly visited by the Departmental Officers and even the specialised agencies like, Internal Audit, AG's Audit and Anti Evasion Wing have inspected their record. The said authority has further said in the aforementioned orders that in view of this factual position, the charge of suppression of material facts or of misstatement is also false.

According to the petitioner, the accounts of the Company were audited by two firms of Auditors, namely, M/s. Chaturvedi & Shah & M/s. Rajendra & Co., and also by AG's Audit and Anti Evasion Wing, and if any wrong entry could not be discovered by such audit parties, the allegation that the non-finding of this entry by the petitioner amounts to the abetment of the offence of evasion of duty, would be travesty of truth and it would amount to an imaginary and feeble statement. Thus, therefore, the petitioner submits that the issuance of the process against him and obliging him to subject to a Criminal Trial would clearly be erroneous and would amount to miscarriage of justice. It is broadly on this basis that the petitioner has urged that, this Court should call for the records and proceedings of Criminal Case No.441 of 1987 pending on the file of learned Addl. Chief Metropolitan Magistrate, Ahmedabad, and to examine the legality, validity and propriety of the orders of the issuance of the summons and ultimately to quash and set

aside the same.

When the reference is made to the complaint filed by the respondent no.1 against the nine accused persons including the present petitioner, the following say appears to be emerging:

"That, the statement of the accused no.8 Shri Sohan Chaturvedi, Partner of M/s.Chaturvedi & Shah, Chartered Accountants, Bombay and the accused no.9 Shri Narottambhai Bhikhalal Shah, Senior Assistant of M/s.Rajendra & Company, Chartered Accountants, Bombay, were also recorded under Section 14 of the said Act, wherein, both of them, inter-alia, stated that they were joint auditors of the said Company and during 1983, they had audited accounts of the said Company. The said accused no.8 and 9 were bound to check the relevant entries of this case in the various registers of the accused no.1 Company regarding the proper payment of excise duty and also the account books of the Company with a view to see that the said entries of payment of duties have found their place in the Company's account books. But, both the accused no.8 and 9 have remained silent on this aspect and they have joined hand with the accused no.2, 3 and 4 in not disclosing this fact in the Company's audit report and have thereby facilitated the evasion of duty by the other accused persons of this case, and hence, they have also abetted the commission of the present offences by the other accused persons."

This say of the complainant in the complaint would go to show that the allegations against the present petitioner is that, he had joined hand with other Auditor and the accused persons nos.2, 3 and 4 in not disclosing the fact in the Company's Audit report and have thereby facilitated the evasion of duty by other accused persons and hence, they have also abetted the commission of the present offences by other accused persons. Therefore, the gravamen of the charge against the petitioner is that, he was guilty of not disclosing the facts regarding the relevant entries in the Company's Audit report and necessarily, thereby, he has facilitated the evasion of the duty by the other accused persons and has thus, abetted the commission of the offences by other accused persons.

It is not in dispute that, at all the relevant times, the petitioner was working as Senior Assistant in

the firm of M/s.Rajendra & Co., Chartered Accountants, Bombay and the said firm was carrying on the audit of the respondent no.2 Company, but this discrepancy in the accounts could not be located by other Auditors including the Audit party of the Department. The question, therefore, would be, as to whether, prima facie, it could have appeared to be a case to the learned Magistrate in which the process could have been issued against the present petitioner.

Learned Counsel for the petitioner Mr.Gangulee has placed reliance upon the Supreme Court pronouncement in SHRI RAM, APPELLANT v. THE STATE OF U.P., RESPONDENT, AIR 1975 SC 175. This decision of the Supreme Court says that in order to constitute an abetment, the abetter must be shown to have "intentionally" added to the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abetter is not enough compliance with the requirements of Section 107 of IPC. The Supreme Court makes it clear further that, intentional aiding and, therefore, active complicity is the gist of the offence of abetment under the third paragraph of Section 107 of IPC. In TRILOK CHAND JAIN, APPELLANT v. STATE OF DELHI, RESPONDENT, AIR 1977 SC 666, it has been said that the intention to aid the commission of the crime is the gist of the offence of abetment by aid. In TATA OIL MILLS COMPANY LTD. AND ANOTHER v. UNION OF INDIA AND ANOTHER, 1986(26) E.L.T., 931 (Bom.), it has been said that the expression "abetment" has been defined under the General Clauses Act, as one known in the Indian Penal Code and under the Indian Penal Code, the person is said to abet when such person instigates or participates in commission of the offences.

When the say of the complainant in the complaint extracted hereinabove, is studied with a little care, it appears that the necessary ingredients to constitute the offence of abetment have not been shown even in, prima facie, existence. From the above said averments, the Court below could not have seen the intentional aiding and active complicity of the present petitioner in the offences allegedly committed by the other accused persons. In the same way, the above said averments of the complainant in the complaint do not show even, prima facie, the intention on the part of the present petitioner to aid the commission of the crime. From the said averments, it cannot be said that the present petitioner had instigated or participated in the commission of the offences so as to bring him in the definition of a person who is said to abet the commission

of the offences.

Thus, it appears very clearly that, the Court below was not justified in, prima facie, coming to the conclusion that the material presented before the said Court even on a prima facie assessment, had shown the gist of the offence of abetment.

Learned Counsel Mr.Gehani who appears for the Department, has placed heavy reliance upon the Supreme Court pronouncement in SMT. NAGAWWA, APPELLANT v. VEERANNA SHIVALINGAPPA KONJALGI AND OTHERS, RESPONDENTS, AIR 1976 SC 1947. It was a case of revision before the High Court and the question was regarding the validity or otherwise of the issuance of the process after the inquiry under Section 202 of the Code of Criminal Procedure, 1974. It has been said by the Supreme Court that, at the stage of issuing the process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused. It is also said that, it is not the province of the Magistrate to enter into a detailed discussion of the merits or the demerits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one. The principle laid down by the Supreme Court thus is that, at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint and that he is required only to be, prima facie, satisfied, but in the instant case, it appears that, while issuing the process, looking to the allegations made in the complaint as extracted above, the learned Magistrate could not have, prima facie, satisfied himself for the issuance of the process against the present petitioner. Reliance was also placed by learned Counsel Mr.Gehani, on the Supreme Court pronouncement in STATE OF HARYANA AND OTHERS, APPELLANTS v. CH. BHAJAN LAL AND OTHERS, RESPONDENTS, AIR 1992 SC 604. It was a case in which there were clear allegations in the complaint constituting the cognizable offence. It was held by the Supreme Court that the quashing of the FIR by the High Court while acting under Article 226 of the Constitution of India was not justified. But, this decision and the previous one on which the reliance has been placed by learned Counsel Mr.Gehani for the Department, would not assist in furtherance of the case of the Department because, the earlier decision, namely, Smt. Nagawwa (supra) makes it clear that, at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the

evidence led in support of the same, and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused and it is not the province of the Magistrate to enter into a detailed discussion of the merits or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one. Examining the facts of the case on hand, in light of the above said say of the Supreme Court, no case appears to have been made out against the present petitioner as alleged by the complainant.

So far as the offence of criminal conspiracy under Section 120-A of IPC is concerned, it has been said by the Supreme Court in YASH PAL MITAL, APPELLANT v. THE STATE OF PUNJAB, RESPONDENT, AIR 1977 SC 2433 that, the only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy. While saying so, the Supreme Court has made a reference to the decision of the same Court in E.G.BARSAY v. THE STATE OF BOMBAY (1962) 2 SCR 195. The said decision says that the gist of the offence punishable under Section 120-A of IPC is an agreement to break the law and the parties to such an agreement will be guilty of criminal conspiracy.

Merely because the relevant entries and the discrepancy between them could not be noticed by the present petitioner, in absence of any other allegation against him, it cannot be said that he had abetted the commission of the offences alleged against the other co-accused. It should be appreciated that the Register in question was being inquired into, accounted and audited by very many persons and agencies including the Departmental Auditors. Could it be said that all of them would be guilty of the offence of abetment or conspiracy?

Moreover, in the Departmental Proceedings, Collector, C.E. & C. has taken a view that at no stage, the Register in question, was held back from the Departmental Officers and the factory, whereat the Register was being kept, was being visited regularly by the Departmental Officers and the Specialised Agencies, and that they have inspected the record. This view taken by the Collector, C.E. & C. would take out the alleged element of suppression of relevant material, and the intention on the part of the petitioner to aid and abet the alleged commissions of the offences by his co-accused.

Thus, it appears that the petitioner before me

has been able to make out a case for interference in the orders of issuance of process by the Court below. The present petition, therefore, in my opinion, requires to be allowed and the orders of issuance of process qua the present petitioner require to be quashed and set aside. I order accordingly. Rule is made absolute accordingly.

sreeram.